

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1297 Drug-free Workplaces

**SPONSOR(S):** Robinson

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Workforce Development & Tourism Subcommittee		Willson	Barry
2) Appropriations Committee			
3) Commerce Committee			

### SUMMARY ANALYSIS

Currently, an employer subject to the Workers' Compensation Law who implements a drug-free workforce program pursuant to s. 440.102, F.S., is eligible for a workers' compensation insurance discount of up to 5 percent. If an employee in such a program tests positive for drugs or alcohol, the employee may be terminated, and forfeits his or her eligibility for medical and indemnity benefits.

The bill makes a number of changes to the drug-free workplace program, including:

- Amends the definition of "drug" to include substances named in state and federal law;
- Adds additional certification requirements for drug tests and specimens;
- Removes a requirement that an employee be provided a form on which to note medications, which must be taken into account in interpreting drug tests;
- Replaces a list of professions qualified to collect specimens with a requirement that such persons meet qualification standards set by specified federal agencies;
- Requires specimens from positive tests to be preserved for one year after the confirmation test was conducted, instead of 210 days after result was mailed;
- Shortens from 180 to 60 days after notification of a positive result the period during which an employee may have a specimen retested;
- Requires that drug-screening tests meet specified standards;
- Increases the required frequency of followup drug testing from at least once a year for a two-year period to at least six times in the first year and up to two times in the second year.

The bill appears to have no fiscal impact on state or local government.

The bill provides an effective date of July 1, 2020.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### **Drug-Free Workplace Program for Workers' Compensation Employers**

The Workers' Compensation Law in ch. 440, F.S., includes provisions that incentivize drug-free workplaces, and sets out the notice, educational, and procedural requirements that an employer must follow to implement the employee and applicant drug testing that is a component of such workplaces.<sup>1</sup>

If an employer implements a drug-free workplace program that conforms to applicable law and rules, the employer is eligible for workers' compensation and employer's liability insurance discounts<sup>2</sup> of up to five percent,<sup>3</sup> and the employer may require an employee to submit to a test for the presence of drugs or alcohol. If an employee in a drug-free workplace program tests positive for drugs or alcohol, the employee may be terminated, and forfeits his or her eligibility for medical and indemnity benefits.<sup>4</sup>

For the purposes of the drug-free workplace program under s. 440.102, F.S.:

- "Drug" means alcohol, including a distilled spirit, wine, a malt beverage, or an intoxicating liquor; an amphetamine; a cannabinoid; cocaine; phencyclidine (PCP); a hallucinogen; methaqualone; an opiate; a barbiturate; a benzodiazepine; a synthetic narcotic; a designer drug; or a metabolite of any of the substances listed in this paragraph.
- "Drug test" or "test" means any chemical, biological, or physical instrumental analysis administered, by a laboratory certified by the U.S. Department of Health and Human Services or licensed by the Agency for Health Care Administration (AHCA), for the purpose of determining the presence or absence of a drug or its metabolites.
- "Employer" means a person or entity that employs a person and that is covered by the Workers' Compensation Law.
- "Specimen" means tissue, hair, or a product of the human body capable of revealing the presence of drugs or their metabolites, as approved by the U.S. Food and Drug Administration or the AHCA.<sup>5</sup>

Prior to testing, an employer must give all employees and applicants for employment a written policy statement that contains certain information, including:

- The employer's policy on employee drug use,
- The consequences of refusing to submit to a drug test, and
- A list of all drugs for which the employer will test, described by brand, common and chemical name.

An employer must include notice of drug testing on vacancy announcements for positions for which drug testing is required.<sup>6</sup>

An employer is required to conduct job applicant, reasonable-suspicion, and routine fitness-for-duty drug testing. If an employee in the course of employment enters an employee assistance program for drug-related problems, or a drug rehabilitation program, the employer must require the employee to submit to a drug test as a follow-up to such program, unless the employee voluntarily entered the

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<sup>1</sup> See ss. 440.101 and 440.102, F.S.

<sup>2</sup> S. 440.102(2), F.S. See s. 627.0915, F.S., providing that the Office of Insurance Regulation must approve rating plans for workers' compensation and employers' liability insurance that give specific identifiable consideration in the setting of rates to employers that implement a drug-free workplace program pursuant to s. 440.102 F.S., and attendant rules.

<sup>3</sup> R. 69L-5.220, F.A.C.

<sup>4</sup> S. 440.101(2), F.S.

<sup>5</sup> S. 440.102(1), F.S.

<sup>6</sup> S. 440.102(3)(c), F.S.

program. If follow-up testing is required, it must be conducted at least once a year for a 2-year period after completion of the program.<sup>7</sup>

Specimen collection and testing for drugs pursuant to s. 440.102, F.S., must be performed in accordance with the procedures set forth in the statute.

An employee or job applicant whose drug test result is confirmed as positive in accordance with s. 440.102, F.S., must not, by virtue of the result alone, be deemed to have a “handicap” or “disability” as defined under federal, state, or local handicap and disability discrimination laws.

An employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with this section is considered to have discharged, disciplined, or refused to hire for cause.

### Effect of the Bill

The bill makes numerous changes to the definitions, requirements, and procedures relating to drug-free workplaces for Workers’ Compensation Law employers under s. 440.102, F.S. Specifically, the bill:

- Amends the definition of “drug” to include any form of alcohol, including ethanol, methanol, propanol, and isopropanol; any controlled substance identified under Schedules I, II, III, IV, or Schedule V of s. 893.03, F.S.;<sup>8</sup> and any controlled substance identified under Schedules I, II, III, IV, or V of the Controlled Substances Act, 21 U.S.C. § 812(c).
- Amends the definition of “drug test,” to provide that when testing for alcohol, the drug test must be conducted in accordance with the United States Department of Transportation alcohol testing procedures authorized under 49 C.F.R. part 40, subparts J through M.<sup>9</sup>
- Adds the U.S. Department of Health and Human Services (HHS) and U.S. Department of Transportation (USDOT) to the definition of “specimen”.
- Changes the written policy statement that employers are required to give to all employees and applicants prior to testing by removing from the procedures the requirement that employees and job applicants could confidentially report to a medical review officer their use of medications *both before and after being tested*. The bill also removes the requirement that the policy contain the brand name of drugs being tested for.
- Increases the required frequency of mandatory followup drug testing for certain employees from at least once a year for a two-year period to at least six times in the first year and up to two times in the second year.
- Provides that a specimen container for saliva or breath testing is not required when the specimen is not being transported to a laboratory for analysis.
- Removes a requirement that a form must be provided upon which an employee may provide information considered by the employee to be relevant to the test, including the use of medication, and deletes the requirement that such information be taken into account in interpreting positive confirmed test results.
- Replaces a requirement that a drug test specimen may be taken or collected by a physician, physician assistant, registered professional nurse, licensed practical nurse, nurse practitioner, certified paramedic at scene of accident, or qualified lab employee with a requirement that a specimen may be collected by a person who meets the qualification standards for urine or oral

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<sup>7</sup> S. 440.102(4), F.S.

<sup>8</sup> Section 893.03, F.S., classifies controlled substances into five categories, known as schedules. These schedules regulate the manufacture, distribution, preparation, and dispensing of the substances listed in the schedules. The most important factors in determining the schedule classification of a substance are the “potential for abuse” of the substance and whether there is a currently accepted medical use for the substance in the United States.

<sup>9</sup> This rule describes required procedures for conducting workplace drug and alcohol testing for the federally regulated transportation industry. See USDOT, *Overview of 49 CFR Part 40*, <https://www.transportation.gov/odapc/part40> (last visited January 27, 2020).

fluid specimen collection as specified by the HHS or the USDOT. For alcohol testing, a person must meet the USDOT for a screening test technician or a breath alcohol technician. A hair specimen may be collected and packaged by a person who has been trained and certified by a drug testing laboratory. A person who directly supervises an employee subject to testing may not serve as the specimen collector for that employee unless there is no other qualified specimen collector available.

- Clarifies that a specimen amount should be sufficient for two independent drug tests - one to screen the specimen and one to confirm the screening results.
- Extends the amount of time that a positive, confirmed test must be preserved, from “210 days after the result of the test was mailed or otherwise delivered to the medical review officer” to one year after the confirmation test was conducted.
- Shortens from 180 days to 60 days the period after a positive test during which an employee or applicant may have the sample retested.
- Provides that a second lab must test the specimen at the limit of detection for the drug or analyte confirmed by the original, and if the drug or analyte is detected by the second laboratory, the result must be reported as reconfirmed positive.
- Removes a requirement that an applicant or employee’s explanation or challenge of a positive test must be provided to the applicant or employee.
- Removes the requirement that an employee must verify a positive test result with a confirmation test prior to taking adverse action against an employee or job applicant, and creates an exception when a confirmed positive breath alcohol test was conducted in accordance with U.S. Department of Transportation alcohol testing procedures.
- Allows an employer that performs drug testing or specimen collection to follow chain-of-custody procedures established by HHS or USDOT.
- Removes a provision specifying that, if an initial drug test is negative, the employer may in its sole discretion seek a confirmation test, and removes a provision that only licensed or certified laboratories may conduct confirmation drug tests.
- Provides that all laboratory positive initial tests on a urine, oral fluid, blood, or hair specimen must be confirmed using gas chromatography/mass spectrometry or an equivalent or more accurate scientifically accepted method approved by the HHS or the USDOT, and removes a provision that the tests can be confirmed by methods approved by the AHCA or the U.S. Food and Drug Administration.
- Provides that for a breath alcohol test, an initial positive result must be confirmed by a second breath specimen taken and tested using an evidential breath testing device listed on the conforming products list issued by the National Highway Traffic Safety Administration and conducted in accordance with USDOT alcohol testing procedures.
- Removes a requirement that lab reports of drug tests must include any correlation between medication reported by the employee or applicant and the test result.

The bill provides an effective date of July 1, 2020.

#### B. SECTION DIRECTORY:

Section 1      Amends s. 440.102, F.S., revising definitions; revising the contents of an employer policy statement with respect to employee drug use; revising the frequency of followup testing; revising specimen collection, verification, and documentation procedures; revising requirements for confirmation testing; conforming provisions to changes made by the act; revising minimum requirements for laboratory reports of a drug test result.

Section 2      Provides an effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Indeterminate. If the amended testing standards in the bill reduce the number of drug-testing facilities that can comply, those drug-testing facilities that can comply should see an increase in the number of tests they perform.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

#### **2. Other:**

None.

### **B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking authority.

### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

## **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**